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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

LINDA CARNES, Plaintiff and Appellant, v. THE SUPERIOR COURT OF PLACER COUNTY, Defendant and Respondent.	C045867 (Super. Ct. No. SCV13904)

APPEAL from a judgment of the Superior Court of Placer County, Carlos P. Baker, Jr., Judge. (Retired Judge of the Justice Ct. for the former Corcoran Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed with directions.

George F. Allen for Plaintiff and Appellant.

Porter, Scott, Weiberg & Delehant and Nancy J. Sheehan for Defendant and Respondent.

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* Under California Rules of Court, rules 976(b) and 976.1, only the Introduction, part I, and the Disposition are certified for publication.

INTRODUCTION

After her probationary employment was terminated for the discourteous treatment of a coemployee and for insubordination to her supervisor, plaintiff Linda Carnes sued her employer, the Superior Court of Placer County (hereafter PCSC), for disability discrimination, harassment on account of disability, failure to reasonably accommodate her disabilities, and retaliation. From a summary judgment in favor of PCSC, Carnes appeals, contending there were triable issues of material fact. We agree, but only with respect to Carnes's cause of action for harassment. Accordingly, in the unpublished portion of the opinion, we will reverse the judgment and direct the trial court to vacate its order granting summary judgment and enter a new order granting summary adjudication of Carnes's causes of action for discrimination, failure to reasonably accommodate her disabilities, and retaliation in favor of PCSC, but denying summary adjudication of Carnes's cause of action for harassment.

FACTUAL AND PROCEDURAL BACKGROUND

On review of a summary judgment in a defendant's favor, we "view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendant['s] own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We do not, however, consider any evidence to which objections were made and sustained. (*Johnson v. City of*

Loma Linda (2000) 24 Cal.4th 61, 65-66.) Employing these standards, the following facts appear from the record:

In December 1986, Carnes suffered the onset of Guillain-Barré Syndrome (GBS), which left her completely paralyzed for more than a year. She later regained partial mobility, but continued to suffer from residual nerve damage such that, as of June 2000, she walked with a limp, had difficulty with stairs, would occasionally fall due to her knees giving out, and had a claw deformity in her hands.

After she recovered from the initial paralysis of GBS, Carnes was diagnosed as suffering from depression, and in 1989 she began taking anti-depressant medication, which she continued to take through the events underlying this lawsuit. Because of her depression, when Carnes is placed in stressful interpersonal situations, she sometimes becomes tearful and upset and needs a few minutes to pull herself together.

In June 2000, PCSC hired Carnes as a temporary account clerk. PCSC's accounting department was located on what is known as the "4 1/2 floor" of the historic courthouse in Auburn. This floor is akin to a loft and is reached by using either a set of stairs or a mini-lift from the fourth floor. When Carnes was hired, the accounting department consisted of Kerry Rose (the department manager), Rhonda Williamson, and Ann Waters.

Shortly after she was hired, Carnes applied for an account technician position, which was essentially a lead worker position within the PCSC accounting department. Williamson and

Waters also applied for the position. Rose selected Williamson to fill the position.

In December 2000, Carnes applied for a career/permanent account clerk position with PCSC. Rose ultimately selected her for that position. Carnes's six-month probationary period in that position was due to expire on July 26, 2001.

The work relationship between Williamson and Carnes was anything but smooth. Williamson interrupted Carnes, criticized her work, and spoke to her in a rude and condescending way. Less often, usually when no one else was present, Williamson would yell at Carnes, get uncomfortably close to her, and behave angrily. After Carnes talked to Williamson about her limited mobility, Williamson piled objects on the floor around her desk. Williamson would also remove papers and files from Carnes's desk, then throw them back on the desktop when she was done, even though Carnes asked her to put them away. Williamson knocked over a porcelain angel Carnes had in her workspace in what appeared to Carnes to be a deliberate act, then said something like, "'Oh, I am so sorry,'" in a sarcastic tone.

In February 2001, Carnes began keeping a journal to document what she considered to be "a consistent pattern of harassment developing that [wa]s being directed toward [her] by . . . Williamson."

On April 13, 2001, a "blowup" occurred between Williamson and Carnes, which Carnes later characterized as the worst conflict between them. Williamson interrupted Carnes during a telephone call Carnes made to another department at Williamson's

direction. When the phone call ended, Williamson "got really upset," "stood right next to [Carnes] and told [her], how dare you talk about me against me to somebody else in another department." As the confrontation continued, Williamson leaned over Carnes's chair, "right in [her] face," which Carnes "just couldn't take," so she "pushed [her] chair back and . . . stood up and . . . said, no, you're inappropriate," then left.

When Williamson informed Rose about the incident a few days later, Rose told her she needed to act more professional in the workplace and told her to learn to get along with Carnes. Later that day, Carnes spoke with Rose about the incident. When she told him she had an appointment, he advised her not to go to Human Resources with the problem because John Mendes, the Chief Executive Officer of PCSC, would get rid of probationary employees who caused trouble. Carnes canceled the appointment.

On June 2, 2001, a Saturday, Carnes injured her leg in a fall. She was off work for a week. Before she returned, she discussed with Rose the fact that if she was to continue working on the "4 1/2 floor," she would have to use the lift. Unfortunately, the lift had been "red-tagged" by a state inspector in March 2001 because of several safety deficiencies. After the lift was "red-tagged," Rose made repeated telephone

calls to the county's facilities department in an effort to have the lift repaired,[1] without success.

When Carnes returned to work after her fall, PCSC placed her temporarily in an office in a single-story building in another location. Carnes had no objection to working there. When the employee who regularly used that office returned two weeks later, PCSC placed Carnes in the clerk's office on the 4th floor of the courthouse, just below the "4 1/2 floor." Carnes remained in that location for about three weeks.

On July 12, 2001, a meeting was held between Mendes, Rose, Nancy Davis (an analyst in PCSC's human resources department), "Bud" Angell (PCSC's human resources manager), and Jim Perry (PCSC's assistant CEO). By the time of that meeting, Mendes had learned about the conflict between Carnes and Williamson, including the incident on April 13. At the meeting, Mendes said he intended to release Carnes because she could not get along with Williamson, because it had "long been [his] philosophy that probationary employees who have personality conflicts with non-probationary employees . . . are released from probation, rather than kept as career employees." At Rose's urging, however, Mendes decided to keep Carnes and extend her probationary period for an additional three months "to give her time to demonstrate an ability to get along with others."

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[1] PCSC was prohibited from spending any of its money on repairs to the courthouse; repairs were the county's responsibility.

On Friday, July 13, 2001, Rose met with Carnes to tell her her probation would be extended. Upon learning of the extension, Carnes became upset and "kind of stormed out."

When Carnes returned to work the following Monday, July 16, she had no intention of going through with an extended probation. Instead, unless the situation was rectified, she intended to leave.

While working with Davis that morning, she told Davis about her journal and asked Davis to read it. Davis agreed to do so, and Carnes left work early to seek medical attention. Later that afternoon, she called Rose and told him she was going to be out for a week because she was sick.

Davis read the journal either later on the 16th or early the next day. After she read it, she gave it to Angell, who told her to call Mendes. This must have occurred on Tuesday the 17th, because on that day Davis contacted Mendes on his cell phone as Mendes was returning from Reno with Judge James Garbolino, the presiding judge at that time. Davis read portions of Carnes's journal to Mendes. By this time, Mendes was aware Carnes had "stormed out" of the room when Rose told her her probation was being extended. After consulting with Judge Garbolino, Mendes decided Carnes should be released from her probationary employment.

The next day, July 18, PCSC sent a letter to Carnes informing her she was being dismissed from her probationary employment because she "participated in the discourteous

treatment of another court employee and [was] insubordinate to [her] supervisor."

In August 2002, Carnes commenced this action against PCSC, Williamson, and Rose. Later, Carnes filed an amended complaint, alleging (as relevant here) causes of action for failure to make reasonable accommodation, harassment, discrimination, and retaliation. Ultimately, Carnes dismissed the action as to Williamson and Rose, leaving PCSC as the only defendant.

In July 2003, PCSC moved for summary judgment or, in the alternative, summary adjudication. Ultimately, finding no triable issue of fact on any of Carnes's four causes of action, the court granted summary judgment in favor of PCSC. This timely appeal followed.

DISCUSSION

I

The Summary Judgment Motion

PCSC's summary judgment motion came on for hearing before a visiting judge on October 10, 2003. The judge did not make a tentative ruling before the hearing, and at the outset of the hearing admitted he had only "sort of scanned" the papers that had been filed but would "read every word before I make any rulings." At the end of the hearing, the judge took the matter under submission.

Two weeks later, the judge issued his written ruling, which read in its entirety: "The Court grants defendants [*sic*] Motion for Summary Judgment and adjudicates each cause of action in defendants [*sic*] favor. Defendant to prepare the form of this

order and include and [*sic*] all findings necessary to support this order." PCSC prepared a 14-page proposed order that included rulings on both parties' evidentiary objections, on which the judge had never expressed an opinion. Carnes objected to the proposed order on the ground that it did "not comply" with subdivision (g) of Code of Civil Procedure section 437c.[2] Notwithstanding Carnes's objection, the judge signed and filed the order, and the accompanying judgment of dismissal.[3]

Carnes contends it was improper for the judge to sign, "without alteration, a 14 page Order prepared by the attorney defending the Superior Court in the lawsuit against that Court," when the judge's own ruling on the motion "provided not even a hint of the basis for its ruling." According to Carnes, the judge "completely abdicated his responsibility to provide an explanation of why he was denying [her] a trial." (Italics omitted.)

PCSC contends the judge's actions were consistent with the practice sanctioned almost 20 years ago in *Tera Pharmaceuticals, Inc. v. Superior Court* (1985) 170 Cal.App.3d 530. There, the

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[2] We grant Carnes's unopposed motion to augment the record on appeal to include the documents lodged with the trial court showing Carnes objected to the initial order and the later amended order (discussed below).

[3] In March 2004, after the notice of appeal was filed, the court entered an amended order that included an award of costs in favor of PCSC. As she had with the original order, Carnes objected to the amended order, this time on the ground that "the circumstances under which it was created do not comply with CCP §437c(g)."

appellate court found fault in an order denying two summary judgment motions because the order "fail[ed] to indicate whether any issues raised by the motions [we]re without substantial controversy" and "it completely fail[ed] to detail the conflicting evidence regarding each triable issue of fact," as required by the summary judgment statute. (*Id.* at p. 532.) In ordering the trial judge to enter an order that complied with the statute, the appellate court noted: "While we may question the wisdom of imposing yet another procedural requirement on already overburdened law and motion judges, we see no alternative. Of course judges should shift the burden to counsel, where it belongs, and require the preparation of an attorney order specifying the disputed issues and citing the relevant evidence." (*Ibid.*; see also *Young v. Superior Court* (1986) 179 Cal.App.3d 28, 32.)

Although we agree that *Tera Pharmaceuticals* approves (appropriately) of shifting to counsel the burden of preparing a formal order on a motion for summary judgment, we do not read that case as sanctioning, nor do we sanction, the total abdication of judicial responsibility that occurred here: to wit, granting a summary judgment motion without *any* specification of the reasons for doing so, then directing counsel for the prevailing party to prepare an order "includ[ing] and [*sic*] all findings necessary to support th[e] order," without telling the prevailing party what any of those "findings" should be.

The impropriety of the judge's action in this case is highlighted by the fact that the judge granted the motion for summary judgment without having made any rulings on the parties' evidentiary objections, even though the parties requested such rulings at the hearing. Thus, at the time the judge granted the motion and told PCSC's counsel to prepare the order granting the motion, it would have been impossible for counsel to determine what evidence the judge found admissible and what evidence the judge found inadmissible in granting the motion. The judge's determination of what evidence was admissible and what was inadmissible became apparent only later, after the judge signed the order PCSC's counsel had prepared containing rulings on the evidentiary objections -- rulings which PCSC's counsel apparently had come up with on their own, without any input from the judge.[4]

Certainly it is not improper for a judge to adopt as his or her own the reasoning a defendant proposes for granting a motion for summary judgment, provided that reasoning is sound and the judge critically evaluates the reasoning before adopting it. Where, as here, however, a judge simply grants the motion, then asks the prevailing party to provide the court with the

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[4] To the credit of PCSC's counsel, we note that the evidentiary rulings they prepared and which the judge adopted were not entirely favorable to PCSC. One of the rulings overruled an objection by PCSC and another sustained an objection by Carnes.

reasoning that will support that result, confidence in the court's integrity is seriously and legitimately undermined.

Notwithstanding our disapproval of the process by which the judge made his order in this case, that process does not compel reversing the judgment. Contrary to Carnes's argument, the judge did not fail to comply with subdivision (g) of Code of Civil Procedure section 437c. In relevant part, that statute provides: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order."

By signing the order PCSC's counsel prepared, the judge adopted that order as his own, and thus that order is the order required by subdivision (g), which states the court's "reasons for its determination." Carnes points to nothing in the record suggesting the judge adopted the proposed order without any critical analysis whatsoever. Thus, we must presume the judge reviewed the order and determined that the reasons expressed therein for granting the motion were sound.

In any event, and more importantly, because our review of the merits of the motion is de novo, "[i]n practical effect, we assume the role of a trial court and apply the same rules and

standards that govern a trial court's determination of a motion for summary judgment." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258.) "Regardless of how the trial court reached its decision, it falls to us to examine the record de novo and independently determine whether that decision is correct." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1149.) Since we give no deference to the judge's ruling (see *Estate of Brenzikofer* (1996) 49 Cal.App.4th 1461, 1466), let alone his reasoning, it does not matter for purposes of this appeal that the judge adopted PCSC's reasoning for granting the motion, even if he did so without critical analysis. The sole question properly before us on review of the summary judgment is whether the judge reached the right *result* -- i.e., entry of judgment in favor of PCSC -- whatever path he might have taken to get there, and we decide that question independently of the trial court.[5] (See *Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376 [on review of summary judgment, an appellate court "reviews the ruling, not the rationale"].)

A different analysis is required for our review of the trial court's wholesale adoption of defendant's rulings on evidentiary objections. Although it is often said that an appellate court reviews a summary judgment motion "de novo," the weight of authority holds that an appellate court reviews a

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[5] However, for reasons stated in the unpublished part of this opinion, the judgment must be reversed as to the harassment cause of action.

final court's rulings on evidentiary objections by applying an abuse of discretion standard. (See *Walker v. Countywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 192, fn. 15; but see *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1291.) We agree with this weight of authority.

In the instant case, we have no confidence that it is the discretion of the trial court (as opposed to defendant's attorneys) that we are reviewing. Nonetheless, reversal is not required. Plaintiff does not contend that any of the evidentiary rulings were incorrect. "Anyone who seeks an appeal to predicate a reversal of [a judgment] on error must show that it was prejudicial. (Cal. Const., art. VI, § 13.)" (*People v. Archerd* (1970) 3 Cal.3d 615, 643.) Plaintiff has failed to show she was prejudiced by the trial court's adoption of evidentiary rulings proposed by defendant's attorneys.

II

Standard Of Review

A defendant may move for summary judgment "if it is contended that the action has no merit . . . ." (Code Civ. Proc., § 437c, subd. (a).) "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts

to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Id.*, subd. (p)(2).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.*, subd. (c).)

"Because the trial court's determination [on a motion for summary judgment] is one of law based upon the papers submitted, the appellate court must make its own independent determination regarding the construction and effect of the supporting and opposing papers. We apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1279.) "Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

III

Mental Disability

As will be seen, each of the causes of action Carnes alleged against PCSC depends on her having a physical disability and/or a mental disability. Carnes alleged in her complaint that she suffers from both types of disability -- specifically, "residual nerve damage caused by Guillain-Barre Syndrome," which she claimed constitutes a physical disability, and also an unspecified "mental and/or emotional illness," which she claimed constitutes a mental disability.

PCSC concedes that Carnes's residual nerve damage constitutes a physical disability. However, PCSC disputes Carnes's claim of a mental disability. PCSC contends "it is incumbent upon [Carnes] to establish that she has a condition that fits within the definition of mental disability," and PCSC claims she has failed to do so.

While PCSC's assertion that Carnes bears the burden of establishing she suffers from a mental disability covered by the Fair Employment and Housing Act (FEHA) is correct to the extent that assertion addresses Carnes's ultimate burden of proof and persuasion at trial, it is *incorrect* with respect to PCSC's summary judgment motion. All Carnes had to do on summary judgment was to offer some evidence from which a reasonable trier of fact could find she suffers from a mental disability, thereby raising a triable issue of fact. She did so. At her deposition, Carnes testified she had been taking prescribed medication for depression since 1989. In her declaration,

Carnes confirmed that she "was diagnosed as suffering from depression not long after [she] recovered from the initial paralysis of GBS" and had "been on anti-depressant medication for approximately 16 years." This evidence is sufficient to create a triable issue of fact as to whether Carnes suffers from depression, and PCSC does not contest that depression qualifies as a mental disability under the FEHA. Accordingly, we proceed based on the facts viewed most favorably to Carnes -- that she suffers from both a physical disability and a mental disability.

IV

Harassment

We begin with Carnes's cause of action for harassment, which we view as the lynchpin of her complaint. Carnes alleged in her complaint that Williamson "harassed [her] because of her disability" and PCSC "took no immediate, appropriate corrective action to stop" the harassment. In moving for summary judgment, PCSC argued Carnes could not establish a prima facie case of harassment because: (1) the disputes between Williamson and Carnes did not constitute harassment; (2) Williamson's actions were not based on Carnes's disability; and (3) Williamson's conduct was not severe and pervasive. PCSC also contended it could not be held liable for Williamson's conduct because PCSC did not know Williamson was harassing Carnes based on her disabilities.

It is unlawful under the FEHA for an employer or any other person to harass an employee because of the employee's physical or mental disability. (Gov. Code, § 12940, subd. (j)(1).)

Harassment by a coemployee is unlawful if the employer, "or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (*Ibid.*)

To establish harassment, it is not necessary to show loss of a tangible job benefit. (Gov. Code, § 12940, subd. (j)(1).) To be actionable under the FEHA, however, there must be more than occasional, isolated, sporadic, or trivial incidents of harassment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466-467.) The harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile working environment. (*Id.* at p. 465.) Of course, it goes without saying that the harassment must occur "because of" the plaintiff's disability. (Gov. Code, § 12940, subd. (j)(1).)

Here, a reasonable trier of fact could find that the harassing behavior Carnes identified in her declaration was sufficiently severe and/or pervasive to create a hostile working environment. According to Carnes, Williamson interrupted her, criticized her work, spoke to her in a rude and condescending way, yelled at her, got uncomfortably close to her, and behaved angrily toward her. Moreover, after Carnes talked to Williamson about her limited mobility, Williamson piled objects on the floor around her desk and would also remove papers and files from Carnes's desk, then throw them back on the desktop when she was done, even though Carnes asked her to put them away. Williamson also knocked over a porcelain angel Carnes had in her

workspace in what appeared to Carnes to be a deliberate act, then said something like, "'Oh, I am so sorry,'" in a sarcastic tone. It is a triable issue as to whether this behavior, taken as a whole, created a hostile work environment for Carnes.

The next question is whether there is sufficient evidence for a reasonable trier of fact to find that Williamson acted as she did *because of* either or both of Carnes's disabilities. We conclude there is.

Carnes suggests such evidence can be found in her own testimony that Williamson treated her worse than other employees (especially after she told Williamson about her "psychological condition") and in Williamson's testimony about a discussion Williamson had with Davis regarding her problems with Carnes. We find Carnes's arguments unpersuasive. Nevertheless, we have discerned for ourselves an evidentiary foundation sufficient to support the necessary causal connection.

In her declaration, Carnes attested to the following instances of harassment: "After I talked to [Williamson] about my limited mobility (which she could also observe), she piled objects in [*sic*] the floor around my desk. She would remove papers and files from my desk, then throw them on my desktop when she was done, even though I asked her to put them away." A reasonable trier of fact could find from the very nature of these actions -- piling objects around Carnes's desk knowing she had difficulty walking and throwing papers and files on Carnes's desk knowing she had trouble using her hands -- that they constituted acts of deliberate cruelty toward Carnes based on

her physical disability -- that is, the residual nerve damage from which she suffered as a result of GBS. Furthermore, if the trier of fact were to make such a finding, the trier of fact could also reasonably infer that Williamson's *other* harassing behavior toward Carnes -- interrupting her, criticizing her work, speaking to her in a rude and condescending way, yelling at her, getting uncomfortably close to her, and behaving angrily toward her -- was likewise motivated by an animus toward Carnes based on her physical disability. Thus, there is a triable issue as to whether Williamson harassed Carnes because of Carnes's disability.

The question that remains is whether a reasonable trier of fact could hold PCSC liable for any such harassment perpetrated by Williamson. "The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. [Citation.] This is a negligence standard." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041; Gov. Code, § 12940, subd. (j)(1).)

In support of PCSC's motion, Mendes stated in his declaration that "[a]t no time prior to releasing Ms. CARNES from her employment did I learn from any source that she had told anyone that she was feeling harassed at work or that she was being treated differently because of her disability." Similarly, Rose stated: "At no point in time prior to Ms. CARNES' release from her employment did I learn from her or any

other source that she was feeling harassed at work or that she was being treated differently because of her disability." Davis stated: "At no time prior to reading Ms. CARNES' journal did I learn from her or any other source that she was feeling harassed at work. At no point did I learn that she felt she was being treated differently because of her disability. At no point did Ms. CARNES indicate to me that she was complaining about being subjected to harassment because of her disability, nor did she write such complaints in the portion of the journal that was disclosed to me."

Carnes offers various arguments based on various evidence aimed at refuting the claims of Mendes, Rose, and Davis that they did not know of any disability harassment by Williamson. For our purposes, however, it is sufficient to note that in opposing the motion for summary judgment, Carnes submitted a declaration by her union representative, Chuck Thiel, in which Thiel asserted he had "talked to Linda several times during her employment with PCSC about her problems with Rhonda Williamson" and Carnes "told [him] that Rhonda was harassing her and that she thought the harassment was due to her disability." More importantly, Thiel asserted: "On more than one occasion, prior to Linda's probation being extended, I told Bud Angell that Linda believed she was being harassed by Ms. Williamson due to disability." Undoubtedly Bud Angell, who was PCSC's "Human Resources Manager," was an "agent" of PCSC for purposes of subdivision (j)(1) of Government Code section 12940. That part of the FEHA imposes liability on an employer for harassment by a

coemployee if the employer, "or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1).) Based on Thiel's testimony, a reasonable trier of fact could find that PCSC knew that Williamson was harassing Carnes because of her disabilities. If PCSC failed to take immediate and appropriate corrective action following any of these communications by Thiel, then PCSC can be held liable for any subsequent disability harassment Carnes endured at the hands of Williamson.

In summary, there are triable issues of fact as to whether Williamson harassed Carnes because of Carnes's disabilities, whether that harassment was sufficiently severe and/or pervasive to create a hostile work environment, and whether PCSC knew of the harassment but failed to take immediate and appropriate corrective action. Accordingly, the trial court erred in summarily adjudicating Carnes's cause of action for harassment in favor of PCSC.

V

Discrimination

Carnes alleged in her complaint that PCSC "discharged her from employment and/or discriminated against her in compensation or in terms, conditions or privileges of employment, because of her disability." In moving for summary judgment, PCSC argued Carnes could not establish a prima facie case of disability discrimination because "the decision to release [her] had nothing to do with her disability."

Mendes, who was responsible for the decision to release employees from their employment, stated in his declaration that he decided to terminate Carnes's employment on July 17, while driving back from Reno, based on her "poor attitude during her meeting with Mr. Rose the previous Friday and statements in her journal expressing deep hatred of Ms. WILLIAMSON and a distrust of COURT management." He later stated in the same declaration that Carnes was released "because of her own conduct in that: (1) she responded to the news that her probationary period was being extended for three months by storming out of a meeting with Mr. Rose; and (2) she provided Ms. Davis with her journal which contained baseless allegations of illegal drug use by a coworker, criticism of COURT management including myself, and showed a strong dislike of Ms. WILLIAMSON to the point where it appeared it would be impossible for the two women to peacefully coexist." Mendes further stated that he made the decision before he ever saw Carnes's journal and that although Davis had read certain passages from the journal to him, she did not read "anything to [him] that indicated Ms. CARNES was being harassed by anyone nor did she read anything that indicated [Carnes] was being treated differently by anyone because of her disability."

It is unlawful under the FEHA for an employer to "discharge [a] person from employment" or to "discriminate against the person in compensation or in terms, conditions, or privileges of employment" because of the person's physical or mental disability. (Gov. Code, § 12940, subd. (a).) To prove a prima facie case of employment discrimination, "[g]enerally, the

plaintiff must provide evidence that (1) he was a member of a protected class, (2) he . . . was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, . . . and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) A defendant employer may obtain summary judgment in two ways: by presenting admissible evidence that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on a legitimate, nondiscriminatory reason. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

"[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

Here, PCSC offered evidence that Carnes's termination was based on legitimate, nondiscriminatory reasons. Thus, it fell to Carnes to offer evidence sufficient to allow a reasonable trier of fact to conclude that PCSC terminated Carnes's employment not for the reasons PCSC offered, but because of one or both of her disabilities. Carnes failed to offer any such evidence.

Carnes first argues that PCSC deviated from certain of its "normal" practices in terminating her employment, and this deviation is circumstantial evidence of unlawful discrimination. First, Carnes claims it is the normal practice of PCSC to closely monitor probationary employees, inform them of any perceived problem, and give them an opportunity to correct the problem, but she was not informed of any problem nor given the opportunity to correct it. Second, she claims it is the normal practice of PCSC when extending a probationary period to prepare a six-month evaluation stating the reasons why probation is being extended, but she received no such evaluation nor any other written notice of the reasons for extending her probation. Third, she claims it is the normal practice of PCSC not to state any reason for rejecting a probationary employee, but her termination letter included specific causes for her termination. Fourth, she claims the memorandum of understanding covering her position required PCSC to give her 10 working days' notice of her termination, with notice being issued at any time up to and including the last day of probation, but PCSC issued her termination notice eight days before her probation ended with only two working days' notice. Finally, Carnes contends PCSC "did not follow its harassment and discrimination policy in response to Ms. Carnes' complaint" -- i.e., her journal.

According to Carnes, "[t]his rash of irregularities and rush to action . . . support an inference that something was amiss, and that the true motive was illegal." In support of this argument, she cites *Arlington Heights v. Metro. Housing*

Corp. (1977) 429 U.S. 252 [50 L.Ed.2d 450]. There, in a case involving an alleged discriminatory refusal to rezone property, the United States Supreme Court noted that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Id.* at pp. 254-255, 266 [50 L.Ed.2d at pp. 457-458, 465].) The court went on to explain: "The historical background of the [challenged] decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. [Citations.] The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. [Citations.] . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (*Id.* at p. 267 [50 L.Ed.2d at pp. 465-466].)

We do not disagree with any of the Supreme Court's statements, but those statements are of no assistance here because even assuming for the sake of argument the deviations from PCSC's normal practices that Carnes claims occurred actually did, and even assuming these deviations raise "an inference that something was amiss," that is not enough for Carnes to avoid summary adjudication of her discrimination claim. As we have explained, Carnes bore the burden of

producing evidence that would allow a reasonable trier of fact to conclude that PCSC engaged in unlawful discrimination -- that is, that PCSC terminated her *because of one or both of her disabilities*. There is nothing in the alleged deviations from "normal" practice that sheds any light on Mendes's purpose in terminating Carnes's employment, let alone that suggests he was motivated by her disabilities. Although "irregularities and rush to action" in her termination might suggest some particular dislike of Carnes, Carnes offers no basis for a reasonable fact finder to conclude that dislike was based on her disabilities.

To the extent Carnes contends the timing of her termination -- which quickly followed the submission of her journal -- supports a reasonable inference of discriminatory animus based on her disabilities, again we disagree. Whether the timing suggests unlawful retaliation for her *complaining* about disability discrimination is a separate question that relates to her retaliation claim, which we address below. With respect to her discrimination claim, however, Carnes fails to identify anything about the timing of her termination that suggests it was based on her disabilities.

The same conclusion follows with respect to Carnes's claim that PCSC's reasons for terminating her employment "changed over time." Even assuming for the moment, and for the sake of argument, that they did change, Carnes points to nothing that would allow a reasonable finder of fact to conclude from these changes, or from anything else, that Mendes actually discharged her because of her disabilities. In short, there is simply no

substantial evidence in the record that Mendes terminated Carnes's employment because of her physical and/or mental disabilities. Accordingly, the trial court did not err in summarily adjudicating Carnes's cause of action for discrimination in favor of PCSC.

VI

Failure To Accommodate

Carnes alleged in her complaint that PCSC failed to make reasonable accommodation for her physical and mental disabilities. Her claim is essentially twofold. First, she claims PCSC failed to repair the lift that gave her access to her workspace on the "4 1/2 floor" of the courthouse, thereby failing to reasonably accommodate her physical disability. Second, she claims PCSC terminated her for "conducting herself in accordance with the instructions from her supervisor" about how she could deal with the consequences of her mental disability, thereby failing to reasonably accommodate her mental disability.

In moving for summary judgment, PCSC argued that despite its failure to repair the lift before it terminated Carnes's employment, it reasonably accommodated Carnes's physical disability in other ways. PCSC also argued that it reasonably accommodated Carnes's mental disability (assuming she had one) by allowing her to leave the work area to compose herself if necessary.

It is unlawful under the FEHA for an employer "to fail to make reasonable accommodation for the known physical or mental

disability of an . . . employee" or "to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subds. (m), (n).)

Here, we will address separately Carnes's claims that PCSC failed to reasonably accommodate her physical and mental disabilities. With regard to Carnes's physical disability, the crux of the issue is whether a reasonable trier of fact could find that by failing to repair the lift to the "4 1/2 floor" before it terminated Carnes's employment, PCSC failed to make reasonable accommodation for her physical disability. We conclude no such finding is possible on this record.

Carnes contends "PCSC never made any effort to have the [lift] repaired after [she] requested it." The evidence does not support that contention. The evidence includes an e-mail from Rose shortly after the lift was "red-tagged" in March, seeking repair of the lift and noting the need for the lift "to move heavy items up/down from the 4 floor to the offices located on the 4 1/2 floor." Moreover, Rose stated in his declaration that after the lift was "red-tagged," he made repeated telephone calls to the county's facilities department in an effort to have the lift repaired, without success.

Carnes implies that all of Rose's telephone calls predated her fall in June, but that implication is based on a misreading

of Rose's deposition testimony. When asked if he did "anything *different* to try and get [the lift] working after [Carnes] called and said she wouldn't be able to use the stairs" (italics added), Rose responded, "Not to my recollection. I don't know what else I could have done." Thus, Rose's deposition does not establish or even support a reasonable inference that all of his calls came before Carnes's fall. Indeed, Mendes testified that because of Carnes's need for the lift, Rose "continued to call facility services, send them e-mails, leave them messages, pretty much tried to micromanage them to get them to do something."

Carnes contends that Rose "said he did not want the [lift] to be fixed, because he thought it would be a 'hassle' for other employees to operated the [lift] controls for [her] (as was required)."[6] Again, however, Carnes misreads the evidence. Margaret Raymond, another employee of PCSC, stated in a declaration that when she asked Rose whether the lift would be repaired before Carnes returned to work after her fall, Rose "said that he did not know, but did not think it would make much difference due to the way the [lift] is set up, in that it cannot be operated by the person riding it." According to Raymond, when she offered to operate the lift for Carnes, or have her assistant do it, Rose "replied that it would be a 'big hassle' to have to do that every time [Carnes] needed to go to

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[6] The lift "requires one person to operate it from below, while another person rides the lift."

the bathroom, go to lunch, or go anywhere else." After yet another offer of assistance, Rose "stated again that he did not want us to have to 'hassle' with it."

Carnes does not direct our attention to any evidence that Rose said "he did not want the [lift] to be fixed," and Rose's statements about the operation of the lift being a "hassle" (which Rose denied) would not allow a reasonable trier of fact to conclude that Rose "did not do anything to get the [lift] working after Ms. Carnes fell" as Carnes contends.

An employer "is not obligated to choose the best accommodation or the accommodation the employee seeks," so long as the employer provides a reasonable accommodation. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.) Here, taken as a whole and viewed in the light most favorable to Carnes, the evidence shows that PCSC had no authority to spend its own money to fix the lift, and Rose made repeated attempts to get the county to fix the lift. While the lift was not working, PCSC accommodated Carnes for two weeks by giving her an office in a single-story building and for another three weeks by giving her office space on the fourth floor of the courthouse, where she worked until she was terminated in mid-July. There is no evidence PCSC ever refused to repair the lift or that PCSC considered Carnes's relocation to the fourth floor a permanent arrangement. On this record, no reasonable trier of fact could find that PCSC failed to reasonably accommodate Carnes's physical disability.

Turning to Carnes's mental disability, Carnes claims that "as an accommodation for her mental disability, she asked that she be able to withdraw from stressful situations to regroup." She does not claim PCSC denied her this accommodation. On the contrary, it is undisputed Rose told Carnes that whenever she felt stressed, she could remove herself from the stressful situation so that she could compose herself. Carnes's contention is that she "was terminated for her response to just such situations," and therefore (apparently) the supposed accommodation of her mental disability was in fact no accommodation at all. The evidence does not support this contention.

Carnes's argument is based on the following syllogism: (1) her employment was terminated, at least in part, because of her behavior during the April 13 incident with Williamson and her behavior during her July 13 meeting with Rose; (2) she was exercising the accommodation PCSC offered her when she left the room following the incident with Williamson and when she left the room following her meeting with Rose; (3) therefore, her employment was terminated because she was exercising the accommodation PCSC offered her.

Carnes points to no evidence, however, that her departure from the room on April 13 formed any part of the reason for her termination. Mendes did say that incident provided part of the support for the assertion in the termination letter that Carnes "participated in the discourteous treatment of another court employee." But according to Mendes, it was the "big argument"

Carnes had with Williamson on that date that led, in part, to the conclusion she had treated Williamson discourteously.[7] There is no evidence that PCSC faulted Carnes for her departure from the room that effectively *terminated* the incident with Williamson, or that the decision to terminate her employment was based on her departure from the room.

A different analysis is required for Carnes's departure from the room on July 13. Carnes's termination letter asserted her employment was being terminated in part because she was "insubordinate to [Rose]." In responses to interrogatories, PCSC asserted this insubordination occurred when Carnes "walked out of a meeting" with Rose. At his deposition, Mendes explained his understanding that Rose "was trying to talk to her and give her her performance evaluation, . . . and she got argumentative, angry, slammed the door, left, didn't come back to work." Later, Mendes asserted in his declaration that Carnes's employment was terminated in part because of her "poor attitude during her meeting with Mr. Rose the previous Friday" and more specifically because "she responded to the news that her probationary period was being extended for three months by storming out of [the] meeting."

Carnes claims "[s]he was terminated for allegedly 'storming out' of the room," but in doing so she was only "conducting

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[7] That conclusion was also based on "the ongoing bickering they had" and Carnes's "refusal to follow [Williamson's] directions when [Williamson] was asking her things in the capacity of a lead worker."

herself in accordance with the instructions from [Rose] that she could remove herself from the upsetting situation." We cannot agree, nor could any reasonable fact finder. There is no dispute Carnes "stormed out" of the room when Rose told her her probation was being extended. Rose stated as much in his declaration. Indeed, he stated that "[u]pon exiting the room, Ms. CARNES shoved the door so violently that I was concerned it would fly back in her face." In her declaration, Carnes claimed "[t]he door to the room where [she] met with Mr. Rose is very heavy" and she "pushed it too hard when [she] left, and it swung open and banged into the wall." At her earlier deposition, however, Carnes admitted she became angry during the meeting with Rose and "kind of stormed out."

The accommodation PCSC offered Carnes for her mental disability was that whenever she felt stressed, she could remove herself from the stressful situation so that she could compose herself. PCSC did not tell Carnes it was permissible to "storm out" of a room in anger, but that is plainly what she did. However understandable her reaction may have been to the news she would have to complete three more months of probation, no reasonable trier of fact could find that in "storming out" of the meeting with her supervisor, Carnes was merely exercising the accommodation PCSC had offered her for her mental disability.

Because there is no triable issue of fact as to whether PCSC reasonably accommodated Carnes's disabilities, the trial

court did not err in summarily adjudicating the cause of action for failure to reasonably accommodate in favor of PCSC.

VII

Retaliation

That leaves us with Carnes's cause of action for retaliation. Carnes alleged in her complaint that PCSC "discharged her or otherwise discriminated against her because she opposed the harassment by defendant WILLIAMSON and filed a complaint against her, and because she opposed her employer's refusal to make reasonable accommodation for her known disabilities and/or medical condition." In moving for summary judgment, PCSC argued that Carnes did not engage in any protected activity because while "she complained of harassment to Rose, . . . she did not complain to Rose that she was being harassed because of her disability." PCSC further argued that assuming the turning over of her journal to Davis on July 16 was a complaint of discrimination, Carnes could not establish a causal connection between that act and Mendes's decision to terminate her employment because Mendes did not know when he made that decision that Carnes had complained of harassment or discrimination in her journal.

It is unlawful under the FEHA for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under" the FEHA. (Gov. Code, § 12940, subd. (h).)

"To establish a prima facie case of retaliation, the plaintiff must show (1) he or she engaged in a protected activity;[8] (2) the employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation 'drops out of the picture,' and the burden shifts back to the employee to prove intentional retaliation." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.)

The heart of Carnes's retaliation claim is that she was discharged because she complained about harassment, discrimination, and the failure to accommodate her disabilities in her journal. As we noted above in connection with Carnes's discrimination claim, Carnes argues that the timing of her discharge and the various procedural irregularities that

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8 It follows from subdivision (h) of Government Code section 12940 that a "protected activity," for purposes of establishing a prima facie case of retaliation, is: (1) opposing any practices forbidden under the FEHA; or (2) filing a complaint, testifying, or assisting in any proceeding under the FEHA. Thus, complaining to a supervisor about an unlawful employment practice is a protected activity. (See *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1188.) By the same token, opposing a failure to reasonably accommodate is also a protected activity.

accompanied it suggests "something was amiss." Tying that argument to her retaliation claim, Carnes contends the "decision to terminate [her] 'on the heels of' her discrimination complaint [i.e., her journal] is . . . suspect." More to the point, it appears to be Carnes's position that there is a triable issue as to whether Mendes decided to terminate her employment because of complaints of unlawful harassment and discrimination in her journal.

It was undisputed that Mendes decided to terminate Carnes's employment while returning from Reno with Judge Garbolino on July 17. The pivotal question is whether there is any substantial evidence Mendes was aware of any complaints of unlawful harassment and discrimination Carnes had made in her journal when he made that decision. In analyzing that argument, it is first necessary to examine the journal to determine the extent to which it contains any such complaints.

Carnes's journal is a 16-page, typed document in which Carnes recorded various events relating to her employment between February 2 and July 14, 2001. In the journal, Carnes generally complains about her relationship with Williamson, including Williamson: (1) delegating her work load to Carnes when Rose is absent; (2) treating Carnes as if she were ignorant; (3) getting upset with Carnes; (4) telling Carnes what to do; and (5) talking down to Carnes. Based on the following specific passages, however, Carnes contends her journal can be read as a complaint for discrimination and harassment based on her disabilities:

1. In the very first journal entry, dated February 2, 2001, Carnes notes "there is a consistent pattern of harassment developing that is being directed toward me from Rhonda Williamson."

2. In the next journal entry, dated February 6, 2001, Carnes documents a meeting with Williamson in which they discussed their problems. That entry reads in pertinent part as follows: "Had the meeting with Rhonda--she says she 'wants this to work out', but she feels that I have an attitude as if I don't think she knows what she's doing. I told her that as far as the courts were concerned, I realize that she probably is more educated about procedures than me--but as far as accounting, I am confident that I know as much, if not more, than her and don't appreciate being treated like I'm ignorant and don't know what I am doing. I also said that, subconsciously, people often think that because my body doesn't work right that my mind is slow, too, and that I feel that this may be where the problem lies (she denies it)."

3. In an entry dated April 16, 2001, on page 10 of the journal, Carnes recounts a conversation she had with Rose about the appointment she had scheduled with Davis in human resources to discuss the incident with Williamson on April 13. According to Carnes, Rose strongly advised her "not [to] take this problem to HR" -- i.e., human resources -- because Mendes had made it clear he would dismiss any probationary employee who "'makes trouble.'" In closing her journal entry, Carnes wrote: "I cancelled my appointment with Nancy--chances are I don't have a

leg to stand on anyway--looks like Rhonda is going to get away with harassment, doing drugs, ignoring ADA, etc."

4. In an entry dated July 8, 2001, which spans from page 11 to page 14 of the journal (there were no entries between April 18 and July 8), Carnes notes with respect to the broken lift, "up until my injury, no one has made any effort to accommodate me and have it fixed." Finally, Carnes notes with respect to Williamson, "Again, I feel she is harassing me . . . ."

Based on these passages, Carnes contends her journal can be read as a complaint for discrimination and harassment based on her disabilities, and thus she contends her submission of the journal to Davis was a "protected activity" for which she could not be discharged. Even assuming for the sake of argument, however, that a reasonable trier of fact could agree with Carnes on this point, the pivotal question for us is whether there is any substantial evidence Mendes was aware of these passages of Carnes's journal when he decided to terminate her employment on July 17. In his declaration, Mendes claimed he was not, stating: "When Ms. Davis read certain passages [from the journal] to me on July 17, 2001, over the telephone, at no time did she read anything to me that indicated Ms. CARNES was being harassed by anyone nor did she read anything to me that indicated she was being treated differently by anyone because of her disability. During that telephone discussion, Ms. Davis did not tell me that Ms. CARNES was filing or had filed a harassment claim against anyone nor did she advise me that Ms. CARNES was

feeling that she was being treated differently by anyone because of her disability."

Did Carnes produce sufficient evidence to allow a reasonable trier of fact to find that this statement by Mendes was false and that, on the contrary, Davis *did* tell him about the parts of Carnes's journal in which she contends she was complaining of unlawful harassment, discrimination, and failure to reasonably accommodate her disabilities? She did not.

Carnes offers three reasons why "PCSC's story that the disability-related entries were not part of the conversation between Davis and Mendes is not worthy of belief." First, Carnes asserts "it is inherently implausible that a trained Human Resources Manager would ignore the journal entries regarding disability harassment, 'ignoring ADA,' and reasonable accommodation." Such an assertion, however, is not *evidence*, which is what is necessary to create a triable issue of fact. To the extent Carnes suggests a reasonable inference about what Davis read to Mendes can be drawn simply from the "fact" that Davis was "a trained Human Resources Manager,"[9] we disagree. In any event, Davis herself testified she did not interpret Carnes's journal as including a complaint of discrimination, and when asked if, at the time of her deposition, the journal "appear[ed] to present a complaint of discrimination," Davis

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[9] Carnes does not point to any evidence supporting that "fact." The record shows, however, that Davis had been employed in various human resources positions with PCSC since December 30, 2000.

answered, "Maybe. I can't say definitively yes." Given this undisputed testimony, and the very veiled nature of the "complaints" Carnes contends can be found in her journal, it is more than plausible Davis would not have read those portions of the journal to Mendes. More to the point, based on this evidence, no reasonable trier of fact could find Davis *must* have read the "disability-related" portions of the journal to Mendes.

Second, Carnes asserts there is a triable issue about what Mendes knew because neither Davis nor Mendes "was able to clearly identify the parts of the journal that . . . Davis read to . . . Mendes on the phone." Although the deposition testimony of Davis, which Carnes cites, does establish that Davis had no memory of what she read to Mendes, Carnes cites no evidence to support her assertion about what Mendes remembered. The inability of Davis to remember what she read to Mendes two years after the conversation occurred (her deposition was taken in July 2003) does not create a factual conflict with Mendes's assertion in his declaration that Davis did *not* read to him anything about harassment or discrimination based on disability.

Third, and finally, Carnes contends "the evidence shows that . . . Mendes knew there was a discrimination complaint before he terminated . . . Carnes." The evidence to which Carnes refers, however, simply does not provide a substantial basis for a reasonable trier of fact to find that Mendes was aware of any complaint of discrimination or harassment based on Carnes's disabilities before he decided to terminate her employment on July 17 while returning from Reno.

Part of the evidence Carnes cites -- Davis's deposition testimony -- establishes that Davis talked with Angell about the journal before she called Mendes. Contrary to Carnes's claim, however, that evidence does not establish or even suggest that Angell "discussed the portions of the journal involving harassment and 'ADA' with Ms. Davis." That is simply a misrepresentation of Davis's deposition testimony.

Other evidence Carnes cites -- specifically, an e-mail from Angell to Mendes in January 2002 purporting to recount the "chronology of events leading to the Probationary Release of Linda Carnes" -- supports the proposition that there was a human resources meeting about Carnes on July 17, at which one of the "questions that came up" was "Any ADA violations? EEO? Harassment?" That e-mail, however, does not support Carnes's assertion that "PCSC management, *including Mr. Mendes*, conducted" that meeting. (Italics added.) There is no mention in the e-mail of who was present at the meeting.

In short, Carnes points to no evidence from which a reasonable trier of fact could find that before he decided to terminate Carnes's employment, Mendes knew she was complaining about disability harassment, discrimination, and/or the failure to reasonably accommodate her disabilities. This missing evidence is fatal to her retaliation claim because without it, Carnes cannot prove a causal connection between her alleged "protected activity" of submitting the journal to Davis and the termination of her employment. Accordingly, the trial court did

not err in summarily adjudicating Carnes's cause of action for retaliation in favor of PCSC.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting the motion for summary judgment and enter a new order granting the motion for summary adjudication as to the causes of action for discrimination, failure to reasonably accommodate, and retaliation, but denying the motion for summary adjudication as to the cause of action for harassment for the reasons stated in this opinion. Plaintiff shall recover her costs on appeal. (Cal. Rules of Court, rule 27(a).)

ROBIE, J.

We concur:

SIMS, Acting P.J.

RAYE, J.